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Cecil Woodard v. W. Brent Jensen v. Richard Severin and Mrs. Richard Severin : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELTON WOODARD, Plaintiff and Appellant, vs. W. BRENT JENSEN, Defendant and Third-Party Plaintiff, vs. RICHARD SEVERIN and MRS. RICHARD SEVERIN Third-Party Defendants and Respondents.	SUPREME COURT NO. 870346 PRIORITY #13

BRIEF OF APPELLANT

Appeal from the Decision of the Utah Court of Appeals

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Plaintiff

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BRIEF OF APPELLANT

The appellant is herein referred to as Woodard and the respondents, Richard Severin and Mrs. Richard Severin, are referred to as the Severins. W. Brent Jensen, the defendant and third-party plaintiff, who is the seller named in the land sale agreement dated September 21, 1972, is referred to as Jensen.

JURISDICTION

This is an appeal from the decision of the Utah Court of Appeals on the granting of Woodard's petition for writ of certiorari. This brief is filed pursuant to a letter from the Supreme Court, dated March 24, 1988, granting twenty days from such date to file a proper brief of appellant. Rule 48(b) of the Rules of the Utah Supreme Court authorizes the filing of a brief after the granting of a petition for writ of certiorari.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Woodard is entitled to the reformation and specific performance of the 1972 agreement to purchase land.

2. Whether Woodard is entitled to the land in dispute as against the Severins who had actual notice of Woodard's interest.

3. Whether the Court of Appeals erred in refusing to order reversal for the failure of the trial court to make findings of fact and conclusions of law on all material issues.

CONTROLLING STATUTORY PROVISIONS

Section 57-1-6, Utah Code Annotated, provides:

> "Recording necessary to impart notice - Operation and effect - Interest of person not named in instrument.
>
> "Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice. Neither the fact that an instrument, recorded as herein provided, recites only a nominal consideration, nor the fact that the grantee in such instrument is designated as trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust, shall operate to charge any third person with notice of the interest of any person or persons not named

> in such instrument or of the grantor or grantors; but the grantee may convey the fee or such lesser interest as was conveyed to him by such instrument free and clear of all claims not disclosed by the instrument or by an instrument recorded as herein provided setting forth the names of the beneficiaries, specifying the interest claimed and describing the property charged with such interest." (Emphasis Added)

STATEMENT OF THE CASE

This is a suit for reformation and specific performance of a 1972 agreement between Jensen, seller, and Woodard, buyer, for the sale of five (5) acres of land, in which the legal description of the land sold was erroneous due to a mutual mistake of fact.

During or about September 1972, Woodard and Jensen met and discussed the purchase by Woodard of a five-acre parcel of land. (R. 287) The land is in the mountains, about eight miles from Wanship, West of Echo Canyon, near subdivisions of lots for cabin sites. At the time of the meeting the land was unsurveyed and unimproved by buildings or other structures. Jensen told Woodard that no land in the area had been sold and that he, Woodard, could buy any five-acre parcel. Woodard selected a parcel (R. 318) and he and Jensen indicated a corner with a pile of rocks. (R. 288)

Jensen, with Woodard's help, prepared a document entitled "Agreement", dated September 21, 1972, a copy of which is attached hereto and is marked Appendix "A". Pages 27 - 28. (R. 289, 290, 316-319). There was an oral agreement at the time the

parties met on the five-acre parcel that Woodard could buy any five-acre parcel as long as he kept the lines straight. (R. 318) Jensen prepared the legal description. (R. 320)

On the day the agreement was signed, Woodard paid to Jensen $7,000. cash on the purchase price (R. 290), and delivered to him 6000 shares of ADAK Corporation stock (R. 291). He later delivered title to a pick-up truck to Jensen. (R. 291) In a promissory note dated December 8, 1973, (Appendix "B", page 29), Jensen agreed to dig the footings and basement for the Woodard cabin. (See Exhibit 21-P and R. 291-294) In August of 1973, Jensen's employees dug the footings and basement and Woodard installed an "I" beam, put on decking, and prepared the cabin for the first floor level. (R. 294) (See also Exhibits 22-P, 23-P, 24-P, 25-P, 26-P, and 27-P consisting of checks for material and labor which support Woodard's testimony as to when the cabin was constructed).

The legal description in the agreement is of land in the Southwest quarter of Section 28, Township 1 North, Range 4 East, SLB&M, and the land selected by Woodard, which he believed to be accurately described, was actually in the Northwest quarter of Section 28. See Exhibits 18-D and overlay 18-A. Jensen admitted that he owned the North half of Section 28 in 1972 and that he did not own any land in the South half of the Section (R. 476). He testified that when he prepared the description in the agreement, he assumed that he was describing land from the West quarter corner and that he had made a mistake. (R. 476, 477)

Woodard filed his complaint against Jensen on December 10, 1974, for specific performance of the Agreement dated September 21, 1972. (Appendix "A" and R. 2-5) He sought a deed to the real estate described in paragraph 1 and in Note No. 1 of the Agreement. In his separate answer, Jensen admitted that he did sell to Woodard the real estate described in paragraph 3 of the agreement and gave Woodard a first right and option to purchase other property "....when said property was properly recorded,". (R. 10, 11)

The first reference in the file to the mutual mistake of fact in deeding to Severin the land previously sold to Woodard appears in a report of a pre-trial settlement conference dated June 1, 1979, where it is stated:

> "It appears that from representations of Counsel that the defendant in a mutual mistake of fact deeded the property which is the subject matter of this action to one Richard Severin. It appears to the Court that in order that this matter may be settled once and for all, that the defendants should file a third party complaint against Severin to set the deed aside on the basis that it was given in error. Counsel have represented that the contract with the plaintiff was entered into prior to the time that the property was deeded to Mr. Severin. However, the contract was not recorded. Therefore, upon motion of Mr. Adams and the concurrence of Mr. Nygaard, the Court authorizes the defendants to file a third-party complaint against Mr. Severin to have the deed set aside. At such time as the case is again at issue, plaintiff may make application for a new trial date." (R. 68)

On July 6, 1979, Jensen filed a Third Party Complaint against the Severins in which he admitted that he had "....mistakenly and erroneously conveyed right, title, and interest in

and to the subject real property to the Third Party Defendants...." He also alleged that prior to such conveyance he had conveyed "....right, title, and interest to the subject real property to the plaintiff." (R. 70) In paragraph 8 he alleged:

> "The Plaintiff's right, title, and interest in and to the subject real property is superior to the Third Party Defendant's interest in and to the subject real property."

He sought an order "....rescinding the mistaken portion of the conveyance between the defendant and the Third Party Defendants and conveying and quieting title to and in this mistaken portion to the Plaintiff." (R. 70)

The plaintiff filed a second amended complaint on April 11, 1980, increasing the amount of damages demanded, (R. 103). A third amended complaint was filed on October 17, 1980, alleging for the first time the mistake in the description of the real property the parties intended to sell and purchase and upon which the plaintiff built his cabin. This third amended complaint seeks reformation of the agreement dated September 21, 1972, and specific performance of the agreement, as reformed, and an order requiring the Severins to quit claim to the plaintiff the five-acre parcel of land on which the Woodard cabin was built. (R. 107-111)

In his answer to the third amended complaint, Jensen admitted the mistake (R. 134) and also admitted the mistake in his third party complaint. (R. 69, 70) Jensen also pleaded that

the issues between Woodard and the Severins was "....due to mutual mistake by both the plaintiff and defendant." (R. 180)

The Severins started constructing a summer home in 1973 (R. 441) about three weeks after the footings were poured on the Woodard cabin. (R. 303) The Severin cabin was about 250 to 300 feet from the Woodard cabin, according to Woodard's testimony. (R. 297) The relative locations of the two cabins are shown on Exhibit 20-D which is a map prepared by Interwest Engineering Corporation. Severin first saw the footings of the Woodard cabin in 1974. (R. 452)

The Severins started acquiring land in the North half of Section 28 by a deed dated August 20, 1973, Exhibit 1-D, and acquired additional land in 1974, 1976, and 1977. See Exhibits 2-D, 3-D, 5-D, D-35, and D-36. Exhibit 5-D, dated July 30, 1976, describing 56.01 acres, covers the land where the Woodard cabin is built.

Richard Severin met Woodard in 1973 at Kent Jensen's cabin. (R. 301) Woodard testified that he was discussing with Kent Jensen getting a road cut into where he planned to build his cabin, and Severin said: "I hope you're not going to just build a shack over there, because I am going to build a nice cabin." (R. 302) Woodard testified that he had seen Severin a time or two when the footings were being poured (R. 302), and later from time to time about building the cabins. (R. 304) Severin did not interfere and never told Woodard that he owned the land. (R. 305, 306) Severin testified that at the time he first met

Woodard he was told that Woodard had an agreement to buy five acres of land near his property and had been told that many times. (R. 460-468) He said he could very well have said, "Don't build a shack or something." (R. 441)

The evidence is that there is a road which was used for access to both the Severin and Woodard cabins across which Severin had constructed a gate. (R. 300) In 1977 or 1978, Severin gave Woodard a key to the gate. (R. 301, 470)

Severin recalled a conversation with Woodard when he asked him why he was building his cabin when it wasn't his land, and Woodard said something to the effect that Jensen had sold him the land and that it was his land. (R. 466) Severin did nothing about it and did not seek legal advice. (R. 467)

Despite the admissions by Jensen in his pleadings (R. 70, 134, 180) and in his testimony (R. 475, 476) that there was a mutual mistake of fact as to the location of the land intended to be sold by the written agreement, Appendix "A", the trial court, in deciding the case in favor of the Severins, made no findings of fact and conclusions of law on mutual mistake of fact, reformation, actual notice of the 1972 Agreement by the Severins, and the equitable right to enforce the reformed agreement. In its Opinion, the Court of Appeals affirmed the judgment of the trial court, stating that the equitable remedies of reformation and specific performance are not available in this case. Appendix "C", pages 30 - 34.

SUMMARY OF ARGUMENT

The issue between Woodard and the Severins as to the ownership of the five acre parcel of land erroneously described in the 1972 land sale agreement between Jensen, as seller, and Woodard, as buyer, is the only issue involved in this appeal. Woodard paid $7,000 cash, transferred a truck to Jensen on the purchase price, and took possession of the land in 1972, and he and Jensen partially constructed a summer home thereon. Jensen, with Woodard's help, prepared the land description in the agreement and, by mistake, tied it to the southwest corner of an unsurveyed, unimproved section of mountain land instead of to the west quarter corner of the section. The mistake is admitted by Jensen in his pleadings and testimony.

In 1976, Jensen sold to the Severins a 56.01 tract of land which included the five acre parcel sold to Woodard in 1972. Severin had notice of Woodard's interest in the land several years before 1976, yet he did nothing to prevent Woodard from building his cabin. At a pre-trial settlement conference in 1979, the mutual mistake of fact as to the description of the five-acre parcel first became evident and the trial court authorized the defendants to file a third party complaint against the Severins to have the 1976 deed set aside. The plaintiff was authorized to file a third amended complaint. After being brought into the case, the Severins filed a pleading entitled "third party complaint and counterclaim" against Woodard and Jensen to

quiet their title to the five acre parcel. Woodard answered, putting in issue the respective claims of Woodard and the Severins. The judgment quieted the Severins title against Woodard and does not mention mutual mistake of fact, reformation, or specific performance of the 1972 agreement.

On appeal, the Court of Appeals affirmed the judgment of the trial court, holding that the equitable remedies of reformation and specific performance are not available in the instant case. This decision is based solely on Jensen's understanding of Summit County's new requirements for "....recording recreational property". There is no evidence in the record of any ordinance containing these requirements.

Woodard contends that the Court of Appeals erred in failing to reverse the judgment of the trial court and for its failure to order reformation of the agreement to correct the admitted mutual mistake. The Court of Appeals also erred in failing to order specific performance of the agreement as against both Jensen and the Severins. In 1976, the Severins bought the 56.01 acre parcel, with actual notice of the 1972 Woodard-Jensen land sale agreement.

The Court of Appeals further erred in failing to reverse the decision of the trial court, because it failed to make any finding of fact or conclusion of law on the issues of the intent of the parties to the agreement, Severin's notice of the agreement, mutual mistake, reformation, and specific performance. Such failure is reversible error.

ARGUMENT

I.

WOODARD IS ENTITLED TO REFORMATION AND SPECIFIC PERFORMANCE OF THE 1972 AGREEMENT TO PURCHASE LAND

The Court of Appeals, in its opinion, quoted only the part of the 1972 Agreement favorable to the conclusion reached which relates to the recording with Summit County of Lot No. 1, to the purchase of Lot No. 2 in Forest Meadow Ranch, Plat C, and to the agreement to furnish title insurance. See Appendix "A". The Court significantly omitted from its opinion the following:

> "4. The seller agrees to provide cullinary water to Lot No. 1 through a central water system.
>
> "5. The seller warrants to the buyer that a properly installed septic tank system will meet all county and state requirements for sewage disposal and no accessment (sic) will be made for a sewage hook-up.
>
> "6. Terms of the sale. The buyer agrees to pay $7,000.00 in cash and 8,000 shares of Adak Energy Corporation stock hereinafter referred to as the Stock. The seller acknowledges the stock is investment stock and at the present time is not tradable. The seller agrees that the stock will be held in escrow in the sellers name at the main office of Walker Bank & Trust, Salt Lake City, Utah until said stock becomes free trading. The buyer guarantees to the seller that the stock will have a market value of $1 per share on or before October 1, 1974, and that the seller will be able to sell through a broker the stock for $1 a share. The buyer retains an option to purchase back the said stock for $1 per share on or before October 1, 1974."

It was obvious error for the Court of Appeals to consider only a part of the agreement. "It is well established that a contract must be construed as a whole and the intentions of the

parties thereto must be collected from the entire instrument and not from detached portions." O'Malley Investment v Trimble, (Ariz 1967) 422 P2d 740.

The Court of Appeals then decided that in the absence of proof that Lot No. 1 was recorded in Summit County, the condition precedent in the agreement had not been fulfilled and that, therefore, "....the equitable remedies of reformation and specific performance of the agreement are not available to Woodard." Appendix "C", pages 33-34.

The decision based on this technical point ignored the facts recited in the statement of the case that both parties to the Agreement treated it as a Contract of Sale, and completely ignored the "unfulfilled" condition of recording. These facts include:

(1) Payment of $7,000. cash and delivery of 6,000 shares of stock which the buyer, in paragraph 6, guaranteed would be worth one dollar per share by October 1, 1974.

(2) The loan of $4,800, in December, 1972, to Jensen for which Jensen agreed "....to do the following items for Cecil Woodard's cabin:

"1. dig and pour footings

"2. dig basement

"3. cut driveway

"4. install septic tank

"5. to pay for all the materials and labor to cover the cost of items 1,2,3,4

"6. The items mentioned above must be done on or before July 1, 1973."

See Appendix "B".

3. The transfer by Woodard to Jensen, in December, 1972, of a Ford truck of a value of $4,800. for payment on the purchase price as a substitute for the return of the shares of stock. (R. 291)

4. Jensen's employees dug the footings and basement in August of 1973 and Woodard installed an "I" beam, put the cinder block up, put the decking on top, and prepared the cabin for the first floor level. (R. 294)

5. The tender by Woodard to Jensen of $3,200., the balance due on the purchase price. (R. 108)

6. The admission by Jensen in several pleadings that there was a mutual mistake as to the legal description of the five acre parcel that Jensen intended to sell and Woodard intended to buy. (R. 69, 70, 134, and 180)

It is clear from the foregoing that the parties intended that the parcel marked on the ground was to be sold. It is equally clear from the conduct of the parties, namely Jensen and Woodard, that the Agreement was not an option and that the parties did not intend that the recording of the subdivision was a controlling condition to the existence of the Agreement. If they intended otherwise, Woodard would not have paid $11,800 on the purchase price and they would not have built the cabin.

We quote from Williston on Contracts, (Jaeger) 3rd Ed., Vol. 4, at page 815:

> "It is said that the conduct of the parties ---is of material weight in determining what the parties intended---in case of ambiguity, the practical construction given by the parties to the contract over a period of years is persuasive. But when the contract is clear, the fact that the parties followed a different plan cannot work a revocation of the plain agreement. Where there is doubt as to the proper construction of an instrument, the conduct of the parties is entitled to great consideration. But where its meaning is clear in the eye of the law, the error of the parties cannot control its effect".

In the case of Matanuska Valley Farmers Coop v. Monaghan, (1951) 188 F2d 906, the Court held:

> "Since the parties to the contract have in fact followed the method of payment from the outset and have made no attempt to conform to the provisions of paragraph 7, they must be deemed to have modified the written contract by mutual agreement. It is well established that parties to a contract can, by mutual agreement, modify or rescind a contract and adopt in its stead a new agreement. An agreement to change the terms of a contract may be shown by the conduct of the parties as well as by evidence of an explicit agreement to Modify."

Citations in support of the foregoing include:

> 3 Williston on Contracts, Sec 623, N. 6 1936;
> Whitehurst v FCX Fruit & Vegetable Service, (1944) 224 N.C. 628, 32 SE2d 34, 39;
> City Messenger & Delivery Co. v Postal Telegraph, (1915) 74 Or 433, 145 P. 657;
> Saul v. McIntyre, (1948) 57 Atl 2d 272, 274;
> Margoles v. Mollenick, (1906) 98 NYS 349.

The Utah cases that hold that a written contract will be reformed to express the agreement of the parties where the proof of mutual mistake is clear, definite, and convincing are:

Peterson v. Eldredge, (1952) 122 Utah 96, 246 P2d 886;
Sine v. Harper, (1950) 118 Utah 415, 222 P2d 571;
Janke v. Beckstead, (1958) 8 Utah 2d 247, 332 P2d 933.

In this case, the mutual mistake in the description of the land is admitted by Jensen in his pleadings. (R. 70, 134, 180, 475, 476) The intention of the parties was to sell and purchase Lot No. 1, as erroneously described, and not Lot No. 2 referred to in the Agreement. The intended lot was that marked on the ground with a pile of rocks on which the Woodard cabin was built by Woodard and Jensen's employees in 1973. The description was later determined by a survey and is contained in paragraph 8 of the Third Amended Complaint. (R. 323)

The Court of Appeals dismissed the remedies of reformation and specific performance by stating:

> "The equitable remedies of reformation and specific performance are not available in the instant case." See Appendix "C" at pages 33-34.

No reason is given in the opinion for disregarding the intentions of the parties and these equitable remedies. Woodard paid nearly all of the purchase price for the parcel marked on the ground and spent thousands of dollars on the summer cabin. He was certainly entitled to the relief given others by this Court.

II.

WOODARD IS ENTITLED TO THE LAND IN DISPUTE AGAINST THE SEVERINS WHO TOOK TITLE WITH ACTUAL NOTICE OF WOODARD'S INTEREST

The Court of Appeals based its opinion entirely on the portion of the 1972 Agreement to the effect that there was a condition precedent to the effectiveness of the Agreement, namely that Lot 1 had to be recorded "with Summit County". Appendix "C", pages 33-34. Further, the Court of Appeals, on the same pages, stated that after the execution of the Agreement "....Jensen discovered Summit County had changed its requirements for recording recreational property. The new requirements, as Jensen understood them, made it impossible for him to subdivide and record Woodard's desired property."

There is no proof in the record of any law or ordinance of Summit County on the subject at all. An effort was made by Jensen's attorney to get Jensen's conclusion regarding restrictions on his right to sell in the record, and on motion, the testimony of Jensen was stricken. (R. 371) Absent such proof, the Agreement between the parties was valid.

Section 57-1-6, UCA, quoted above, on page 2, provides that a contract shall be binding between the parties and without proofs, acknowledgment, certification, or record as to all other persons who have actual notice. It is true that the recorded agreement, with the land described as being in the wrong quarter section, did not, as a matter of law, give the Severins notice, but they took title to Woodard's 1972 Agreement because they had

actual notice. There can be no doubt as to the agreement being binding as between Woodard and Jensen. Woodard paid in cash and by transfer of a truck $11,800 on a $15,000 purchase price for the conveyance of the five acres of land, and tendered the balance of $3,200, as stated in the Third Amended Complaint (R.108). Jensen was bound by contract to convey the land. During the pendency of this suit, he sold the five acre parcel to the Severins and conveyed it by the deed dated on July 30, 1976. (Ex. 5-D)

The conveyance to the Severins is subject to the reformed 1972 agreement if, on or before July 30, 1976, the Severins had actual notice of the Woodard agreement.

This Court has, in several cases, considered the application of the statute and has several times ruled on the question as to what constitutes actual notice.

In the early case of Toland v. Corey, 6 Utah 392, 24 P. 190 (1890), this Court stated the law as follows:

> "Our statute requires actual notice and constructive notice is not sufficient. The demands of the statute are answered if a party dealing with the land has information of a fact or facts that would put a prudent man upon inquiry, and which would, if pursued, lead to actual knowledge of the state of the title; and this is actual notice. 2 Pom. Eq. Jur. §§597, 598, et seq. The appellant was in the actual occupancy of the premises, and actual occupancy is enough to put parties dealing with the premises upon inquiry. Id. § 616, note 3, and § 617. But the contention of the respondents is that the possession of the appellant was consistent with the title shown by the record, and therefore the mortgagees were under no obligation to look beyond the record, and were authorized to consider her possession as under her life-estate only. On this question the authorities are both ways. Id. § 616, note 3, and

§ 617. We think the better doctrine is that an occupant's possession is actual notice of his title, and all persons with notice of such possession must at their peril take notice of his full title in the premises, no difference what the record shows. Until the recording statutes were enacted, possession was notice of ownership, and a conveyance made by a party out of possession was void. The purpose of these statutes was not to change the rule that possession was evidence of title and notice to all the world of ownership, but to afford the means of preserving the chain of title, and give notice of the ownership of unoccupied lands. It would be an unwarranted application of the recording acts to say that they destroy the effect of occupancy as notice and evidence of ownership. We think therefore, that a person at his peril deals with or purchases real estate of one, in the possession of another, although said possession may be consistent with the record title. It is easy to find out the real situation by inquiry of the party in possession, and it is his duty to do so. The conclusion, therefore, is that none of these mortgages, except the one for $350, were liens upon the premises of appellant." (Emphasis added)

This case was followed in 1918 by Shafer v. Killpack, 53 Utah 468, 173 P. 948 (1918), and by the case of Gappmeyer v. Wilkinson, 53 Utah 236, 177 P. 763 (1919). In the last case cited, the defendants Wilkinson (in the same position as the Severins in this case) were told before the deed was delivered that certain children were interested in the property to the extent of $3600; that the property had already been deeded to the children, and that there were other facts and circumstances indicating that the land had been conveyed by an unrecorded deed. This Court held that the second deed was a nullity because the record showed that the grantee had such notice as would put any reasonable person upon inquiry to ascertain what the interest was.

In the more recent case of Meagher v. Dean, 97 Utah 173, 91 P2d 454 (1939), this Court stated the rule as follows:

> "In 13 L.R.A., N.S., page 51, et seq. 'The broad rule is laid down by a large number of the cases, that open, notorious, unequivocal, and exclusive of ownership, is constructive notice to all the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature.' Toland v. Corey, 6 Utah 392, 24 P. 190; Ayres v. Jack, 7 Utah 249, 26 P. 300; Neponset Land & Live Stock Co. v. Dixon, 10 Utah 334, 37 P. 573; Lynch v. Coviglio, 17 Utah 106, 53 P. 983; Stahn v. Hall, et al, 10 Utah 400, 37 P. 585; Dennis v. Northern Pac. Ry. Co., 20 Wash. 320, 55 P. 210.
>
> "The doctrine of notice of a claim of title to lands from possession thereof springs from the apparent, not the true, relation that the person in possession bears to the title, and rests upon the theory that actual and visible possession is a fact of such a character and notoriety as cannot possibly escape the observancy of a subsequent purchaser or encumbrancer, and is in its nature sufficient to put him on inquiry as to the rights of the possessor.' Neponset Land & Live Stock Co. v. Dixon, supra."

The case of Webster v. Knop, 6 Utah 2d 203, 312 P2d 557 (1957), holds that the failure in a duty to inquire is failure of an element of good faith.

In this case, Woodard went into possession of the five acre parcel, indicated on the ground by a pile of rocks, in 1972, started constructing his cabin in 1973, and finished it in 1975, all within the knowledge of the Severins, and is still in possession. This alone was enough to constitute actual notice of Woodard's interest and to defeat the deed as to Woodard's five acres.

Mr. Severin testified that Woodard had told him that Jensen had sold him the land. We quote:

"Question (By Mr. Hansen): When Mr. Woodard started building his cabin -- strike that. Do you recall when Woodard started building his cabin on property which you claim is yours?

"Answer: I can't give you the date, but I can recall a conversation when Cecil came over to get some water at my cabin, and I asked him why he was building it when it wasn't his land.

"Question: And what did he tell you?

"Answer: Well, that something -- well, that -- something to the effect that Brent had sold him the land and that it was his land.

"Question: What did you then do?

"Answer: Nothing.

"Question: Did you take any action to prevent him from continuing to build on the property?

"Answer: I didn't take any action to preclude him from building.

"Question: Did you ever tell him not to build?

"Answer: It wasn't my place to tell a man not to build something.

"Question: But you claim the land to be yours?

"Answer: Right.

"Question: You didn't tell him that he had to stop building his cabin?

"Answer: No, sir. I am not in a position to tell a man to stop anything.

"Question: Okay. Did you seek legal advice at that time?

"Answer: No, sir.

"Question: You allowed him to proceed?

"Answer: Yes, sir. I didn't -- I allowed him to proceed to build. I didn't have any -- I wasn't going to start a war up on that hill."

(R. 466,467)

As indicated, this conversation took place when Woodard was building his cabin in 1973 or 1974. Severin had a duty to inquire about Woodard's interest, and he did nothing. See also Mr. Severin's testimony about when he first met Woodard in 1972 or 1973, (R. 453, 484) and testimony of Severin that he had probably met Woodard fifteen times and every time they met they discussed Woodard's interest in the property (R. 465,466).

Woodard's possession and Mr. Severin's testimony establishes actual notice of Woodard's interest. Without question the Severins' 1976 deed is subject to Woodard's contract right. This being an equity suit, the decree should include a provision requiring the Severins to execute and deliver to Woodard a Quit Claim Deed conveying to Woodard the land described in paragraph 8 of the third amended complaint. Woodard, by his pleadings, has tendered the balance of the purchase price to Jensen, and, to complete the transaction, must pay to Jensen the balance of the purchase price if he gets a deed to the land from the Severins.

III.

THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE JUDGMENT OF THE TRIAL COURT FOR FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ALL MATERIAL ISSUES

Rule 52(a) of the Utah Rules of Civil Procedure, insofar as pertinent, provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A ...."

In the case of Romrell v. Zions First National Bank, 611 P2d 392 (Utah 1980), this Court construed the above mentioned rule and stated the law as follows:

> "In the instant case the trial court had responsibility to make findings of fact and conclusions of law, notwithstanding the advisory verdict of a jury. Rule 52(a) U.R.C.P., states in part:
>
> (The Court here quotes the above excerpt from Rule 52(a)).
>
> "This requirement is mandatory and may not be waived. In re Murphy's Estate, 269 Minn. 393, 131 N.W.2d 220 (1964); 9 Wright & Miller, Federal Practice and Procedure: Civil Sections 2335, 2574 (1971). Failure of the trial court to make findings of fact on all material issues is reversible error. Rucker v. Dalton (Utah) 598 P.2d 1336 (1979)."
>
> Piper v. Eakle, 78 Utah 342, 2 P.2d, 909 (1931).

It will be noted that the trial court failed to make findings of fact and conclusions of law on the following major issues framed by the pleadings and tried by the court:

a). The mutual mistake of fact as to the legal description in the 1972 agreement.

b). The intent of the parties to the agreement that Woodard purchased the land marked on the ground by a pile of rocks and outlined in cross-hatched red on Exhibit 18-D.

c). Whether Woodard, with the knowledge of the Severins, was in possession of the five-acre tract before 1976 when the Severins purchased the 56.01 acre parcel of land on which the Woodard cabin is located.

d). Whether the Severins had actual notice of the Woodard agreement before 1976.

The materiality of each of the foregoing issues of fact is discussed at length above and will not be repeated here.

The conclusions of law are likewise incomplete and insufficient to support the judgment and are not supported by the findings of fact. The major issues of reformation of the 1972 agreement, the specific enforcement thereof, and actual notice of the agreement by Severins are not even mentioned.

As stated in the quotation from the case of Romrell v. Zions First National Bank, supra, the provisions of Rule 52(a) are mandatory and cannot be waived.

CONCLUSION

The Court of Appeals erred in concluding and holding that the 1972 Agreement was conditional on the recording of a subdivision, that the condition never happened, and that there was no valid contract to reform or enforce. The Court significantly quoted in its opinion only the parts of the Agreement which tended to support this conclusion, and omitted the part which sets out the terms of a sale. The Court, in reaching this conclusion, disregarded the following facts showing the true intentions of the parties which are either admitted or are clearly established:

1. Woodard paid $11,800. on a purchase price of $15,000. and tendered the balance.

2. Woodard, with the help of Jensen, marked a corner of the unsurveyed parcel with a pile of rocks and took possession of the land in 1972.

3. In 1973 and 1974, Woodard, with Jensen's help, partially constructed the Woodard cabin with the full knowledge of the Severins who acquired the land in 1976 with admitted notice of Woodard's possession and agreement.

4. Jensen, who prepared the description of the five-acre parcel, by mistake, tied it to the Southwest corner of the Section instead of to the West quarter corner.

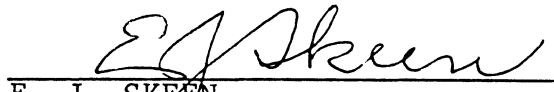
5. By their conduct, the parties to the Agreement treated the transaction as a firm contract of sale and not a conditional sale or option.

Further, the Court of Appeals erred in affirming the judgment of the trial court, which entirely disregarded Rule 52(a) that makes mandatory, in non-jury, civil cases, the making of Findings of Fact and Conclusions of Law on all material issues.

The judgment of the Court of Appeals should be reversed and the case remanded, with directions to reform and specifically enforce the 1972 Agreement, to nullify the part of the 1976 deed to the Severins which covers the Woodard parcel, and to require the Severins, upon payment by Jensen of an equitable consideration, to execute and deliver to Woodard a deed to the five-acre parcel in dispute.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the Brief of the Appellant to be mailed, first class postage prepaid, this 13th day of April, 1988, to the following:

Jerrold S. Jensen
Attorney at Law
9 Exchange Place, Suite 200
Salt Lake City, Utah 84111

Attorney for Third-Party
Defendants-Respondents

Mr. W. Brent Jensen
983 Third Avenue
Salt Lake City, Utah 84103

Defendant and Third Party Plaintiff

E. J. SKEEN

APPENDIX "A"

AGREEMENT

September 21, 1972

AGREEMENT

This agreement made and entered into this 21st day of September, 1972, by and between W. BRENT JENSEN, Hereinafter referred to as Seller and CECIL WOODARD, hereinafter referred to as buyer. Now, therefore, it is hereby agreed between the parties as follows:

1. It is agreed that the seller is desirous of selling and the buyer is desirous of buying a parcel of ground more specifically described as Beginning N. 680ft., 520 ft. E. from S.W. Cor Sec 28 AND RUNNING THENCE; N. 61° 30'E, 670 ft; N 34° 20'W. 665 ft, S61° 30' W, 330ft; S 76°30E 170ft; So. 46° 40'E, 60 ft; South, 60 ft; S. 18° 10' W, 130 ft. more or less To Point of Beginning. The seller also agrees that this parcel of land will be a minimum of 5 acres. See Note No. 1

2. It is understood that Lot No. 1 is in the process of being made ready for recording with Summit County, Utah and cannot be sold at this time. However, seller agrees that when Lot No. 1 is recorded the buyer has first right and option to purchase Lot No. 1.

3. Until that time buyer agrees to buy part of Forest Meadow Ranch Plat C Lot #69, more specifically described as beginning at a point 1520 ft. N, 512 ft. E. from N.W. Cor. Sec. 27, T1N, R4E, SLB&M and running thence: N31° 42' 41" E. 144.59 ft.; N 83° 43'44" E., 183.10 ft.; N. 09° 27' 44" W., 60.83 ft.; N. 73° 28' 27" E, 94.92 ft; South 320 ft., to point of beginning, hereinafter referred to as Lot No. 2. At the time Lot No. 1 is recorded the buyer will release the right and interest in Lot No. 2, and will exercise his option on Lot No. 1.

4. The seller agrees to provide cullinary water to Lot No. 1 through a central water system.

5. The seller warrants to the buyer that a properly installed septic tank system will meet all county and state requirements for sewage disposal and no accessment will be made for a sewage hook-up.

6. Terms of the sale. The buyer agrees to pay $7,000.00 in cash and 8,000 shares of Adak Energy Corporation stock hereinafter referred to as the Stock. The seller acknowledges the stock is investment stock and at the present time is not tradable. The seller agrees that the stock will be held in escrow in the sellers name at the main office of Walker Bank & Trust,

Salt Lake City, Utah until said stock becomes free trading. The buyer guarantees to the seller that the stock will have a market value of $1 per share on or before October 1, 1974, and that the seller will be able to sell through a broker the stock for $1 a share. The buyer retains an option to purchase back the said stock for $1 per share on or before October 1, 1974.

7. The seller hereby agrees to furnish to the buyer Title Insurance WARRANTY DEED to the property no later than October 1, 1974

Seller W. Brent Jensen
W. Brent Jensen

Buyer Cecil C Woodard
Cecil Woodard

Note No. 1 Beginning at a point North, 680 ft. and East, 520 ft. from the S.W. corner sec. 28, tin, R4E, SLB&M and running hence N 61° 30' E, 670 ft.; N 30° 00' W, 330 ft.; S. 61° 20' W, 665 ft.; S 76° 30' E, 170 ft. ; S 46° 40' E, 60 ft..; South, 60 ft.; S 18° 30' W, 130 ft. to the point of beginning.

Seller W Brent Jensen
W. Brent Jensen

Buyer Cecil C Woodard
Cecil Woodard

APPENDIX "B"

PROMISSORY NOTE

December 08, 1972

EX. 21-P

PROMISSORY NOTE

December 08, 1972

For Value received, I promise to pay Cecil Woodard $4,800.00 with interest payable November 1, 1974, at the rate of 1% per annum. In consideration for this loan, I agree to do the following items for Cecil Woodard's cabin:

1. dig and pour footings
2. dig basement
3. cut driveway
4. install septic tank
5. to pay for all the materials and labor to cover the cost of items 1,2,3,4
6. The items mentioned above must be done on or before July 1, 1973

W. Brent Jensen

APPENDIX "C"

OPINION

UTAH COURT OF APPEALS

CASE NO. 860037-CA

Filed July 27, 1987

IN THE UTAH COURT OF APPEALS

----ooOoo----

Cecil Woodard, Plaintiff and Appellant,	)	
v.	)	OPINION (For Publication)
W. Brent Jensen, Defendant and Third-Party, Plaintiff,	)	
v.	)	Case No. 860037-CA
Richard Severin and Mrs. Richard Severin, Third-Party Defendants and Respondents.	)	

Before Judges Garff, Bench and Jackson.

BENCH, Judge:

Cecil Woodard appeals a trial court judgment quieting title in Richard and Donna Severin to a five acre parcel of property. We affirm.

In 1972, Woodard met with a developer, W. Brent Jensen, to discuss the purchase by plaintiff of five acres of mountain property, owned by Jensen, as a cabin site. They agreed on a parcel and marked a corner with a pile of rocks. On September 21, 1972, Woodard and Jensen executed a written agreement, prepared by them, which states in pertinent part:

> This agreement made and entered into this 21st day of September, 1972, by and between W. BRENT JENSEN, hereinafter referred to as Seller and CECIL WOODARD, hereinafter referred to as buyer. Now, therefore, it is hereby agreed between the parties as follows:

> 1. It is agreed that the seller is desirous of selling and the buyer is desirous of buying a parcel of ground more specifically described as
>
> [a metes and bounds legal description is written in by hand].
>
> The seller also agrees that this parcel of land will be a minimum of 5 acres.
>
> 2. It is understood that Lot No. 1 is in the process of being made ready for recording with Summit County, Utah and cannot be sold at this time. However, seller agrees that when Lot No. 1 is recorded the buyer has first right and option to purchase Lot No. 1.
>
> 3. Until that time buyer agrees to buy part of Forest Meadow Ranch Plat C Lot #69, more specifically described as
>
> [legal description typed in]
>
> hereinafter referred to as Lot No. 2. At the time Lot No. 1 is recorded the buyer will release the right and interest in Lot No. 2, and will exercise his option on Lot No. 1.
>
> * * *
>
> 7. The Seller hereby agrees to furnish to buyer Title Insurance to the property no later than October 1, 1974.

The handwritten legal description in paragraph one was entered by Jensen a day or two after execution of the agreement. Approximately one week later, Jensen typed in a legal description of the property at the end of the second page of the agreement and the two men again executed the agreement. Both descriptions erroneously described a five acre parcel south of the property Woodard selected which Jensen did not even own.

Woodard paid Jensen $7,000.00 cash and delivered 6,000 shares of stock to him as a down payment on the property. Woodard also delivered to Jensen title to a truck as partial payment and in exchange for Jensen's agreement to dig the footings and basement for the cabin. In August, 1973, despite having no title yet in the property, Woodard began construction of his cabin on the five acre parcel of property he had selected.

Meanwhile, and also in August, 1973, Jensen conveyed a 17.59 acre parcel, just south of Woodard's cabin, to Richard and Donna Severin. The Severins also began construction of a cabin that month. The parties met occasionally and discussed their cabins. At one time, Richard Severin asked Woodard why he was building on land he did not own. Woodard told Severin he had an agreement with Jensen to purchase the property. Jensen conveyed additional property to the Severins on November 22, 1974.

On December 10, 1974, Woodard filed a complaint against Jensen seeking specific performance of the agreement and execution of a warranty deed to the property described in paragraph one and at the bottom of page two. In his answer filed January 7, 1975, Jensen admitted he sold to Woodard the property in paragraph three and further gave him a first right and option to purchase other property when recorded. Woodard filed an amended complaint adding an alternative remedy of money damages in light of Jensen's possible inability to fulfill the condition of recording under the agreement.

On July 30, 1976, Jensen, through Security Title Company, conveyed 56 acres to the Severins by special warranty deed. This acreage encompasses the prior two conveyances from Jensen to the Severins plus most of the five acres claimed by Woodard. On December 27, 1977, Jensen again through Security Title Company conveyed ten more acres to the Severins which encompasses the remainder of the property claimed by Woodard.

At a pre-trial conference between Woodard and Jensen, the parties realized the mutual mistake committed in the description of the property. The trial court authorized Jensen to file a third-party complaint against the Severins to rescind the five acre portion of the deed claimed by Woodard. Jensen filed his third-party complaint on July 6, 1979 which was later dismissed by the court.

Woodard filed a second amended complaint on April 11, 1980, increasing the requested damages. Then, on October 17, 1980, he filed a third amended complaint alleging for the first time mutual mistake in the original agreement. Woodard offered a substitute legal description of the property and requested reformation and specific performance of the agreement and an order requiring the Severins to execute and deliver a quitclaim deed to the disputed five acres. In the alternative, Woodard requested $63,500.00 in damages.

Trial was held July 8 and 9, 1982. The court found the 1972 agreement was not a conveyance of title to the property and that the Severins were, through a series of recorded conveyances, the record title owners of the disputed property.

Woodard was held to have no right, title, or interest in said property and was, therefore, estopped to claim specific performance of the agreement or a deed to the property. As between Woodard and Jensen, the court ordered Jensen to pay him $25,300.00 in damages, the value of the property with improvements ($28,500.00) less the balance due on the agreed price ($3,200.00).

On appeal, Woodard argues the trial court erred in ignoring in its findings, conclusions, and judgment the following determinative issues: reformation of the agreement, admitted mutual mistake, specific performance of the reformed agreement, possession of the land by Woodard, and actual notice of the Severins. He asks this Court to reverse the judgment and remand with instructions to reform and specifically enforce the agreement against the Severins.

The equitable remedies of reformation and specific performance are not available in the instant case. As Woodard and Jensen discussed the purchase and sale of the property, Jensen informed him the contract he had with the original sellers prohibited conveyances of less than ten acres unless the property was in a recorded subdivision. The parties incorporated this condition into the agreement:

> 2. It is understood that Lot No. 1 is in the process of being made ready for recording with Summit County, Utah and cannot be sold at this time. However, seller agrees that when Lot No. 1 is recorded the buyer has first right and option to purchase Lot No. 1.
>
> 3. Until that time buyer agrees to buy part of Forest Meadow Ranch Plat C Lot #69, more specifically described as
>
> [legal description typed in]
>
> hereinafter referred to as Lot No. 2. At the time Lot No. 1 is recorded the buyer will release the right and interest in Lot No. 2, and will exercise his option on Lot No. 1. (Emphasis added.)

However, subsequent to execution of the agreement, Jensen discovered Summit County had changed its requirements for recording recreational property. The new requirements, as Jensen understood them, made it impossible for him to subdivide and record Woodard's desired property.

Both before and after October 1, 1974, the date by which Jensen was to furnish title insurance to Woodard, Jensen told Woodard that because he was unable to record the subdivision, he could not convey the property. He suggested various alternatives, all of which Woodard rejected.

The Utah Supreme Court has ruled where a certain event or situation is essentially made a condition to an agreement, the absence of such event or situation precludes specific performance of the agreement. BLT Inv. Co. v. Snow, 586 P.2d 456 (Utah 1978). In the instant case, recording was clearly a condition precedent to Jensen's duty to offer a first right and option to purchase the property under the agreement. As the condition precedent of the agreement has not been fulfilled, the equitable remedies of reformation and specific performance of the agreement are not available to Woodard.

We therefore affirm the judgment.

Russell W. Bench, Judge

WE CONCUR:

R. W. Garff, Judge

Norman H. Jackson, Judge